NORFOLK, P. & N. N. Co. *v.* CITY OF NORFOLK.

March 1, 1906.

[52 S. E. 851.]

1. Taxation—Exemptions—Presumptions.—The power and the right of the state to impose a tax is always presumed, and any exemption must be clearly granted; mere silence being the same as a denial of exemption.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 307, 322.]

2. Licenses—Exemptions—Statutory Provisions.—A lessee of property owned by the state and consequently exempt from taxation under the express provisions of Code 1887, § 488 [Va. Code 1904, p. 250], may, notwithstanding such exemption, be subjected to the payment of a license tax for conducting a business on or with such property.

3. Same—Municipal Taxes—Right to Impose.—The fact that the state does not impose a license tax on a business does not prevent a municipality from imposing such a tax.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 5, 6.]

4. Same—Constitutional Requirements—Uniformity of Tax.—An ordinance imposing a license tax generally upon any person operating a steam ferry between certain points does not, when considered with other ordinances authorizing the imposition of a license tax on steam ferries operated between other points, violate the constitutional requirement of uniformity, although there is but one company engaged in operating steam ferries between the points first mentioned.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 8, 9.]

5. Municipal Corporations—Ordinances—Presumptions.—The burden is upon one alleging the invalidity of an ordinance to establish such invalidity.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 284.]

Error to Circuit Court of City of Norfolk.

Action by the city of Norfolk against the Norfolk, Portsmouth & Newport News Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

T. J. Wool and *Frank L. Crocker,* for plaintiff in error.
Richard B. McIlwaine, Jr., for defendant in error.

BUCHANAN, J. The principal question involved in this case is whether or not the city of Norfolk has the power to impose a license tax upon the Norfolk, Portsmouth & Newport News Company, doing business in that city, when the instrumentalities

of that business are owned by and leased from the county of Norfolk and the city of Portsmouth.

It appears that the city of Portsmouth and the county of Norfolk are the joint owners of certain steam ferries which ply by authority of law between the city of Norfolk and the city of Portsmouth, and between the city of Norfolk and the town of Berkley, known as the "Norfolk County Ferries." By authority of law the said owners of the ferries leased the ferries to one J. L. Watson and others for a period of 10 years at an annual rental, one-half of which was to be paid to the city of Portsmouth and the other half to the county of Norfolk. This lease was assigned to the appellant, the Norfolk, Portsmouth & Newport News Company, which was operating the lease at the time the license in question was imposed by the city of Norfolk, in which is located the principal offices of the appellant company.

It is conceded that under section 457 of the Code of 1887, as amended by an act approved January 28, 1896 (Acts 1895-96, p. 218, c. 178 [Va. Code 1904, p. 239]), section 488 of the Code of 1887 [Va. Code 1904, p. 250], and the case of Black *v.* Sherwood, 84 Va. 906, 6. S. E. 484, the real and personal property leased in this case are exempt from taxation.

Since the city of Norfolk has no authority to impose a tax upon the leased property, it is argued that it has no power to impose a license tax upon the business of the lessee in operating the ferries, and whose principal office is in that city.

The appellee in conducting its business is entitled to, and receives, the police protection and supervision of the city of Norfolk, and no good reason is perceived why it should not bear some part of the expense of the city government, unless it has been granted immunity from taxation. The power and the right of the state to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption. Lake Drummond Canal Co. *v.* Com., 103 Va. 337, 348, 349, 49 S. E. 506, 68 L. R. A. 92; Phoenix, Ins. Co. *v.* State of Tenn., 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660.

There is nothing in any of the acts of assembly relied on which expressly or by necessary implication exempts the lessee of property, which is itself exempt from taxation, from the payment of a license tax for conducting a business on or with such property. If there be no such exemption, the fact that the state does not impose a license tax thereon for state purposes does not prevent a municipality, clothed with all the power of taxation possessed by the state within its corporate limits, from imposing such tax.

In the case of the City of Norfolk *v.* Griffith-Powell Co., 102 Va. 115, 45 S. E. 889, it was held that the city of Norfolk possessed such power under its charter, and the mere fact that

the state did not impose a license tax upon a particular business did not prevent the city from imposing such tax. See Harkreader *v.* Turnpike Co., 101 Tenn. 680, 683, 49 S. W. 751; City of New Orleans *v.* Crappel, 18 La. Ann. 725.

It is also insisted by the appellant that the ordinance violates the constitutional requirement of uniformity, as there were other steam ferries plying between Norfolk and Pinners Point and West Norfolk, in the county of Norfolk, and between Norfolk and Gilmerton, which are not taxed by the terms of the ordinance.

It appears from the agreed statement of facts that the appellant operated the only steam ferries that were in operation between Norfolk and Portsmouth and Norfolk and Berkley at that time, but the ordinance (No. 134) in terms imposed a license generally upon any person, firm, or corporation operating a steam ferry between those points, respectively, so that any other person, firm, or corporation who might engage in the same business would be subject to the same tax. While that ordinance does not impose a license tax upon any person, firm, or corporation engaged in operating ferries in the city of Norfolk other than those operated between Norfolk and Portsmouth and Norfolk and Berkley, there is another ordinance (No. 143) under which a license tax be imposed upon them, and there is nothing in the agreed statement of facts to show that such license is not imposed. Neither does it appear that all persons in the same class or doing precisely the same business are not taxed alike. Morgan's Case, 98 Va. 812, 35 S. E. 448. When an ordinance is attacked upon the ground that it is invalid, the burden is upon the party alleging its invalidity to show it.

We are of the opinion that there is no error in the judgment complained of, and that it should be affirmed.

CARDWELL, J., absent.

Note.

Exemption from Taxation.

Exemption Must Be Clearly Shown.—Mr. Justice Swayne, in Tucker *v.* Ferguson, 22 Wall. 527, says: "The taxing power is vital to the functions of government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the case must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all." This is the settled doctrine of the United States Supreme Court. West Wisconsin R. R. Company *v.* Board of Supervisors, 93 U. S. 598; Memphis and Little Rock R. R. Co. *v.* Commissioners, 112 U. S. 609; Southwestern R. R.

Co. *v.* Wright, 116 U. S. 231; Vicksburg R. R. Co. *v.* Dennis, 116 U. S. 665; Chicago R. R. Co. *v.* Missouri, 120 U. S. 586.

Lease of Property Exempt from Taxation.—The doctrine prevailing in most of the states is that if the state leases a portion of the public domain exempt from taxation, the lands so leased are not exempt from taxation in the hands of the lessee. Morris Canal and Banking Co. *v.* Height, 36 N. J. L. 471; State *v.* Cooley, 62 Minn. 183; State *v.* Tucker, 38 Neb. 56, 56 N. W. 718.

The language found in § 3 of article 9 of the Minnesota constitution, whereby it is provided that "public property used exclusively for any public purpose" shall, by general laws, be exempted from taxation, and the legislation on the subject (Gen. St. 1894, § 1512), can not be construed as authorizing the exemption of real property owned and leased by a private party who receives and retains all revenues derived from such leasing, although, under a contract with the owners, the authorities of the municipality in which the property is situated have ordained that such property shall be a public market house or place, and shall be exempt from taxation, and it is thereafter exclusively used for such public purpose, the authorities regulating the business to the extent necessary for the public welfare. State *v.* Cooley, 62 Minn. 183, 64 N. E. 379.

Government buildings on leased lands are exempt. Andrews *v.* Auditor, 28 Gratt. 115.

A city lot owned and used by the county and another city as a landing place for a ferry maintained by them is exempt from taxation under Acts, Va. 1881-82, p. 382, which exempts from taxation "real estate belonging to any city, county, or town," but provides that "nothing herein contained shall be construed to exempt from taxation any part of a lot or building used for any private purpose or for profit." Black *v.* Sherwood, 84 Va. 906, 6 S. E. 484.

Canals.—The exemption from taxation in the prosecutors' charter only applies to such estate or property of the company as is possessed, occupied and used for the actual and necessary purposes of the canal navigation. Lots of land leased to others for their exclusive use and occupancy, in discharging and shipping coal carried over the canal, are not exempt. State, etc., Banking Co. *v.* Love, 37 N. J. L. 60.

Effect of Alienation of Exempt Property.—Immunity from taxation is a personal privilege and does not pass to a transferee or assignee. Wilson *v.* Gaines, 68 Tenn. 546; Commonwealth *v.* Ownesboro, etc., R. Co., 81 Ky. 572; Chicago, etc., R. Co. *v.* Guffey, 120 U. S. 569; Mercantile Bank *v.* Tennessee, 161 U. S. 161, 40 L. Ed. 656; New Haven *v.* Sheffield, 30 Conn. 160; American Emigrant Co. *v.* Iowa R. Land Co., 52 Iowa 323.

Unless the statute creating the exemption expressly so provides. State *v.* Hicks, 17 Tenn. 486; State *v.* Whitworth, 76 Tenn. 594; Commonwealth *v.* Masonic Temple Co., 87 Ky. 349, 8 S. W. 699.